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No. 91-1057

IN THE

Supreme Court of the United States

October Term, 1991

COLIE FOXWORTH,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTIONS OF LAW

1. THE TRIAL COURT ACTS PROPERLY IN OVERRULING A MOTION TO SUPPRESS WHEN IT FINDS SPECIFIC AND ARTICULABLE FACTS WARRANT AN INVESTIGATORY STOP.

2. A REVIEWING COURT DOES NOT "HURDLE" CONFRONTATION AND HEARSAY OBJECTION BY CITING THE RULE WHY TESTIMONY WAS PROPERLY ADMITTED.

3. TESTIMONY OFFERED TO EXPLAIN A WITNESS' ACTIONS IS NOT HEARSAY FOR IT IS NOT OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED.

4. CONSTRUCTIVE POSSESSION OF A CONTROLLED SUBSTANCE IS SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION.

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TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Honorable Court to review this case.

The questions presented herein were raised in the Eighth District Court of Appeals for Cuyahoga County, Ohio and the Supreme Court of Ohio. The jury in the trial court found the petitioner guilty of all four counts of the indictment. The Court of Appeals affirmed the judgment of conviction. The Supreme Court of Ohio dismissed *sua sponte* the petitioner's appeal for the reason that nc substantial constitutional question existed.

The Ohio Courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court and the Supreme Court of the United States. There is, therefore, no substantial federal question presented by the petition for certiorari.

STATEMENT OF THE CASE

The petitioner was arrested by members of the Cleveland Police Department on May 27, 1989. On July 5, 1989, the petitioner was indicted by the Cuyahoga County Grand Jury in a four count indictment. Count one of said indictment charged the petitioner with Possession of Cocaine, in violation of R.C. 2925.03, with the further specification that the amount exceeded three times the bulk amount. Count two of said indictment charged the petitioner with Permitting a Motor Vehicle to be used in the Commission of a Felony Drug Abuse Offense (Possession of Cocaine), in violation of R.C. 2925.13. Count three of said indictment charged the petitioner with Preparing to Ship or Transport Cocaine, in violation of R.C. 2925.03, with the added specification that he had reasonable knowledge it was intended for sale or resale by him or another. The final count of said indictment charged the petitioner with Possession of Criminal Tools, in violation of R.C. 2923.24.

At his arraignment on July 20, 1989, the petitioner pled not guilty to the indictment. A jury trial commenced with the Honorable James P. Kilbane presiding on September 25, 1989. Initially, after the jury was sworn, the Court heard and overruled the Petitioner's Motion to Suppress. The jury, after only one and one-half hours of deliberation, found the petitioner guilty on all counts on September 28, 1989.

On September 28, 1989, the petitioner was sentenced to a term of eight to fifteen years actual incarceration on count one, a term of two years on count two, a term of six months on count three, and a term of one and one-half years on count four. Counts one, two and four to run consecutively in time, and count three to run concurrent.

On December 26th, 1989, petitioner filed an appeal in the Eighth District Court of Appeals. On May 30, 1991, the Eighth District Court of Appeals affirmed the petitioner's conviction and remanded for resentencing. *State v. Foxworth* (May 30, 1991), Cuy. App. No. 58702, unreported.

On July 17, 1991, petitioner filed a Memorandum in Support of Jurisdiction with the Supreme Court of Ohio. On October 23, 1991, the Supreme Court of Ohio dismissed *sua sponte* petitioner's appeal for the reason that no substantial constitutional question exists. As a result, petitioner filed this Writ of Certiorari now before this Court.

STATEMENT OF THE FACTS

A. Motion to Suppress

The State of Ohio, having the burden of going forward, called Detective Michael Caroselli of the Narcotics Unit of the Cleveland Police Department to the witness stand (R. 10). Detective Caroselli testified that while in the Narcotic Unit's Office, a phone call was received from a female who refused to give her identity (R. 11, 12). The female specifically stated that Colie Foxworth, the petitioner, would be in the area of East 125th and Superior between 7:00 and 7:30 p.m., he would be driving a silver grey Cadillac with the license plate number of 739 EXP, and he would be delivering one kilo of cocaine (R. 11-12). Detective Caroselli informed Sergeant Gercar of the anonymous call, and the two of them, along with Detective White, proceeded to the area at approximately 6:50 p.m. (R. 13, 14). At approximately 7:15 p.m. while stationed in the Church's Chicken parking lot on the southeast corner of East 105th Street and Superior, the officers observed a vehicle which matched the description and license plate given to them by the anonymous caller (R. 14).

The officers attempted to pull out and stop the vehicle, but oncoming traffic inhibited them (R. 15). However, following only a few car lengths behind, the officers observed the petitioner pull the vehicle into a gas station at East 125th and Superior and then park (R. 15). Sergeant Gercar, who was driving the unmarked police car, pulled left of the center line and pulled the police car to the car directly in front of the petitioner who had exited his vehicle and began walking in the direction from which he had driven (R. 16). The petitioner was stopped, approximately fifty feet from where he had parked, by Detective Caroselli (R. 16).

Detective Caroselli asked the petitioner for identification, and when produced, the detective immediately recognized that it was the same name (Colie Foxworth) that had been earlier provided by the anonymous caller (R. 16). Detective Caroselli then asked the petitioner what car he was driving, at which time the petitioner denied driving a car even though he was holding keys in his left hand (R. 16, 17).

The detective then informed the petitioner that they saw him driving and exit the car, at which time the petitioner finally admitted he was driving (R. 17). The petitioner handing his keys to the detective, "I'm clean, you can check the car if you want" (R. 17). Detective Caroselli and Sergeant Gercar proceeded to check the car, and in the trunk they found a Nintendo video game box (R. 18). Opening the box, the detective found a large plastic bag with a large quantity of white powder (later analyzed and found to be cocaine) (R. 18).

Detective Caroselli handed the bag to Sergeant Gercar and proceeded back to the area where the petitioner was being detained by Detective White and arrested the petitioner (R. 18). After a lengthy cross-examination, Detective Caroselli did not vary from his original testimony, but did add that the original notes with the petitioner's name, license plate number, automobile description and location were thrown away after they had been incorporated into his report (as he does in all instances) (R. 20-31, 33). Detective Caroselli, under re-cross examination, also stated that there would not be a log or record of the anonymous call for it involved action to be taken within a couple of hours (again standard procedure) (R. 34).

The petitioner testified on his own behalf and of course denied giving consent to having his car searched and that he was never detained but arrested immediately upon being stopped (R. 35-62).

Upon hearing arguments from both the State and the petitioner's counsel, the court correctly overruled the petitioner's Motion to Suppress relying upon *State v. Terry*, 392 U.S. 1, 88 S. Ct. 1868 (1968), and *United States v. Cortez* (1959), 358 U.S. 307 (R. 63-92). The Court properly found that the officers had, using the "totality of the circumstances" test set forth in *Terry*, reasonable suspicion to stop and detain the petitioner; and also that the petitioner's handing of his keys while stating "go ahead check the car, I'm clean" was in effect a consent to search his automobile where the cocaine was recovered (R. 63-92).

Prior to the opening statement, the petitioner made two oral Motions *in Limine*. First, that there be no mention of the petitioner's prior misdemeanor conviction, which the State and Court concurred without objection (R. 93-99). The State objected, stating that it would be wholly proper to indicate that an anonymous complaint was received without a verbatim recital of the phone call; the Court concurred and overruled the petitioner's Motion *in Limine* in part (R. 93-99).

B. Case in Chief

The State called Detective Caroselli of the Cleveland Police Department (Narcotic's Unit) as its first witness (R. 102, 103). Detective Caroselli testified that on May 27, 1989, he was working the second shift (4:00 p.m. to midnight) when his office received an *anonymous call* (R.

104, 105). At this time, after the petitioner had erroneously objected, the Court again warned against any hearsay evidence being introduced (R. 106).

In response to that anonymous call, Detective Caroselli consulted with his supervisor, Sergeant Gercar, and a surveillance was ordered to be set up at Lakeview and Superior (R. 107). Detective Caroselli, Sergeant Gercar and Detective White set up their surveillance in a Church's Chicken parking lot at approximately 6:50 p.m. (R. 108). At 7:15 p.m. the officers left Church's parking lot in pursuit of a 1980 silver Cadillac with the license plate number of 734 EXP which was operating eastbound on Superior (R. 109). Due to traffic flow, the officers were unable to immediately stop the vehicle, but they never lost sight of the appellant's car following a few car lengths behind (R. 110).

The petitioner made a left hand turn into a gas station located at the corner of East 125th and Superior and parked facing westwardly (R. 111). The petitioner exited the vehicle, being the lone occupant, and began to walk westbound on the northside of Superior Avenue (R. 111). Sergeant Gercar, who was driving the police vehicle, immediately pulled left of center and pulled to the curb (facing eastbound in a westbound lane) (R. 112). Sergeant Gercar rolled down his window and called to the male to stop, as Detective Caroselli exited the front passenger door (R. 112).

Sergeant Gercar asked the petitioner was that his car, at which the petitioner denied having a car (R. 113). When asked how he got there, the petitioner replied he had walked there (R. 113). When questioned further, the petitioner then offered the keys which were in his left

hand and stated "go ahead and check the car, *I'm clean*" (R. 113, 114). Detective Caroselli and Sergeant Gercar then began to check the automobile as Detective White remained with the petitioner (R. 114). Upon searching the automobile, Detective Caroselli found a Nintendo game box located in the trunk, and located in the box was a large plastic bag containing a white powdery substance (R. 114-117). Detective Caroselli took the bag, along with the paper he had found on the front seat, and walked back with Sergeant Gercar to the petitioner (R. 118). The petitioner was placed under arrest (R. 120).

While in possession of the petitioner's pager, and still on the scene, the pager activated with a phone number appearing (R. 120). Detectives Caroselli and White went to a phone booth and called the number that had appeared on the pager (R. 121). Detective White had a conversation with the party who had answered the phone call (R. 121).

After an extended and convoluted cross-examination, Detective Caroselli did not deviate from his original testimony (R. 123-149). After redirect and recross examination, the Court began its own inquiry of Detective Caroselli (R. 159). The Court inquired, based upon petitioner's counsel's continuous and repeated questions as to the detective taking notes (R. 146-148), as to what notes Detective Caroselli had taken on that day (R. 159). Detective Caroselli testified that the notes he had taken prior to their surveillance had the year, make, color and the license plate of the car they were hoping to locate (R. 160).

Upon the conclusion of Detective Caroselli's testimony, the petitioner's counsel made a motion to strike the part of Detective Caroselli's testimony which

described the automobile for it was hearsay and contrary to the Motion *in Limine* previously granted in part (R. 164-165). The Court then inquired what limiting instruction the petitioner's counsel would recommend and why (R. 165-169). Petitioner's counsel responded by stating:

> Just instruct the jury that all the information about what Mr. Caroselli had in some notes is *not substantive proof* of any of the charges in this case (R. 169).

Over the State's objections, the Court agreed and did give the exact limiting instruction to the jury that the petitioner had requested (R. 173, 174).

The State called Sergeant Gercar of the Cleveland Police Department (Narcotic's Unit) as its next witness (R. 174). Detective Sergeant Gercar echoed the testimony of Detective Caroselli, including the petitioner's initial denial to driving and later consent to a search of his auto (R. 174-182). The remaining testimony supported and corroborated Detective Caroselli's recollection of the events leading to the arrest of the petitioner (R. 182-187).

Petitioner's counsel again engaged in a long and confusing cross-examination which resulted in absolutely no relevant information (R. 187-203).

As its final witness, the State called Detective White of the Cleveland Police Department (Narcotic's Unit) to the witness stand (R. 208). Detective White's testimony supported that of Detectives Caroselli and Gercar (R. 208-213). Detective White was able to offer additional testimony as to his conversation on the phone based upon the number that appeared on the pager while in the officer's possession (R. 214). Detective White testified that the person identified herself as Eileen (R. 214).

Detective White also testified that his understanding of the conversation was that *the person wanted to buy narcotics* (R. 214-215). At no time did Detective White indicate the person wanted to talk to Colie Foxworth or what the discussion was verbatim that took place that day on the telephone (R. 214-215). The remaining testimony of Detective White further confirmed the facts as previously testified (R. 215-218).

Petitioner's counsel cross-examined Detective White concerning numerous matters and allegations, all of which proved to be fruitless (R. 218-244). An in-camera inspection was conducted of Detective White's report which had been written that night, which produced no material inconsistencies (R. 224-229, 244).

The State rested, its three exhibits and the joint stipulation that the white powdery substance was 500.85 grams of cocaine were accepted into evidence (R. 246-248). Petitioner's counsel renewed its arguments to suppress said evidence (500.85 grams of cocaine) and also asserted his Motion for Acquittal pursuant to Crim. R. 29 of Ohio Criminal Rules of Procedure (R. 248-253). The Court properly overruled both motions of the petitioner (R. 248, 258-266).

In the presentation of his case, the petitioner offered *only* his testimony in his defense (R. 207-310). The petitioner, as to be expected, denied all knowledge or activity in the crimes he was charged (R. 267-310). The elaborate and preposterous story presented by the petitioner was not supported by any testimony from any of the host of characters who were alleged witnesses to his being a "victim of circumstances" (R. 267-310).

REASONS FOR DENYING THE WRIT

1. THE TRIAL COURT ACTS PROPERLY IN OVERRULING A MOTION TO SUPPRESS WHEN IT FINDS SPECIFIC AND ARTICULABLE FACTS WARRANT AN INVESTIGATORY STOP.

In the instant case, the police received an anonymous tip detailing the type of car license plate number, where the vehicle would arrive, the time it would arrive, and that the petitioner would be driving the vehicle containing cocaine. This information was corroborated by the police who spotted the petitioner and the vehicle at the exact place and time that the anonymous tip had indicated.

The facts in the case at bar are almost identical to the facts in the recent United States Supreme Court case of *Alabama v. White* (1990), _____ U.S. _____, 110 S. Ct. 2412. In *White*, the police received an anonymous tip that Vanessa White would be leaving a particular apartment, at a specific time, in a specific vehicle, and would be transporting drugs to a named motel. The police proceeded to the particular apartment and observed White leave the apartment and get into the suspect car. They then followed as she began to drive to the named motel. They stopped her just short of the motel, and searched the vehicle based upon White's consent where they uncovered a quantity of cocaine. The petitioner in this case also consented to a search of the vehicle in which the cocaine was discovered.

The Supreme Court found that the information received from the anonymous tipster, as corroborated by the independent police work of observing White leave the specified apartment at the specified time, and drive a

specified car to a specified location, "exhibited sufficient indicia of reliability to justify the investigatory stop***." (*White, supra*, at 2417).

Clearly, the facts in the instant case mirror those in the *White* case. Based upon the holding in *White*, there is no question the trial court properly overruled the petitioner's motion to suppress. The parameters set forth in *State v. Terry, supra*, as well as the test of the "totality of the circumstances" dictated in *Illinois v. Gates* (1983), 462 U.S. 213, are unquestionably satisfied when read in conjunction with *White, supra*.

2. A REVIEWING COURT DOES NOT "HURDLE" CONFRONTATION AND HEARSAY OBJECTION BY CITING THE RULE WHY TESTIMONY WAS PROPERLY ADMITTED.

At issue in petitioner's second question is the following testimony of Detective White as questioned by the State regarding the phone call made to the number on petitioner's pager:

> Q. *What was your understanding of the conversation—*
>
> MR. WILLIS: *Objection.*
>
> Q. —without saying what the person said?
>
> MR. WILLIS: *Objection.*
>
> THE COURT: *Overruled.*
>
> A. *The person wanted to buy narcotics, sir.*"

The trial court overruled the subsequent objection claiming admissibility under Rule 901(B)(6). The Court of Appeals corrected the trial court by stating 901(B)(6) did not apply because authentication of the person called was not at issue. However, they held the objection was

correctly overruled because Detective White did not recount his conversation with the person called, but merely stated that it was his understanding from the conversation that the person called wished to purchase drugs (R. 11).

The Court of Appeals affirmed the trial court's admission of the testimony indicating that it was in fact not hearsay testimony. Further, the Court of Appeals noted that Evid. R. 901(B)(6), which the trial court cited, does not apply for authentification of the caller is not at issue. What was at issue was whether Detective White's testimony was hearsay, and the Court of Appeals correctly found that Detective White did not recount the conversation with "Eileen", but simply his understanding of the conversation.

The testimony offered by Detective White was wholly proper and admissible, and that the trial court cited the incorrect Rule of Evidence does not negate or lessen that fact.

3. TESTIMONY OFFERED TO EXPLAIN A WITNESS' ACTIONS IS NOT HEARSAY FOR IT IS NOT OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED.

Detective Caroselli testified that they had received an anonymous tip and went to a certain location to observe. At no time during direct examination did Detective Caroselli reveal the information of the anonymous tip, which was in accordance with the petitioner's motion *in limine*.

Upon cross-examination by petitioner, Detective Caroselli was asked several questions about what notes he had with him in the police car from the anonymous tip. These questions formed the basis ("opened the door") for the court's later questions as to the contents of these notes in which Detective Caroselli testified that his notes contained "the year, make, color and license plate number of the car." The trial court, in the proper exercise of caution, instructed the jury that the information contained in the notes of Detective Caroselli is not substantive proof of the elements of the crime.

Unquestionably, Detective Caroselli's testimony was offered to explain the steps and procedure of the investigation. The subsequent testimony, illicited as a result of the petitioner's cross-examination, was also a revelation of information as to explain the officer's subsequent actions. At no time was any testimony offered to prove the truth of the matter asserted which is prohibited by Evid. R. 801(C). Nor was the testimony substantive proof of the petitioner's guilt, as noted by the Court in its limiting instruction to the jury.

The testimony of Detective Caroselli was not hearsay as set forth in Evid. R. 801(C), but merely an explanation of the actions and procedures he took subsequent to receiving information. *State v. Thomas* (1980), 61 Ohio St. 223; *State v. Lopez* (1957), 182 Kan. 46, 313 P.2d 662; *U. S. v. Zamarripa* (8th Cir., 1976), 544 F.2d 978, *cert. denied*, 429 U.S. 1111.

4. CONSTRUCTIVE POSSESSION OF A CONTROLLED SUBSTANCE IS SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION.

In the case at bar, it was established that the vehicle was registered in the name of the petitioner's deceased father, *but* was also registered under the petitioner's birthdate and social security number. Also established was the fact that the petitioner was driving the vehicle just prior to the search in which the petitioner furnished the keys to the officers for the trunk where the contraband was found. Petitioner also testified he used the vehicle regularly.

In *State v. Haynes* (1971), 25 Ohio St. 2d 264, the Court determined that "possession" as defined in R.C. 2925.01(L) can be actual or constructive. The Court in *State v. Wolery* (1976), 46 Ohio St. 3d 316, 332, expounded upon *Haynes, supra* when it established that for the State to prove constructive possession, it must demonstrate that the defendant was able to exercise dominion or control over the prohibited item.

Finally, in *State v. Varsteg* (July 19, 1982), Montgomery App. No. 7562, unreported, the Court found that where one is found to be the driver of a vehicle in which contraband is found in the trunk, it can be established that the driver was in constructive possession of the contraband.

The evidence was sufficient to sustain a conviction of the petitioner for possession of cocaine, for the petitioner constructively possessed the contraband as evidenced by his ownership of the vehicle at the time, and access to the trunk of the vehicle in which the contraband was found.

CONCLUSION

Due Process was served upon the petitioner throughout his trial and appeals, and there is no substantial federal question presented. Accordingly, we respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

No. 7562

COURT OF APPEALS,
SECOND APPELLATE DISTRICT,
MONTGOMERY COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

JOSEPH VORSTEG,
Defendant-Appellant.

Slip Opinion

July 19, 1982

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JUDGES: KERNS, *P.J.*, and WEBER, *J.*, concur.

WILSON, *J.*, concurs in judgment.

OPINION

PER CURIAM:

The defendant, Joseph Vorsteg, was tried in the Court of Common Pleas of Montgomery County without a jury and found guilty of trafficking in marijuana in violation of Section 2925.03(A)(6), Revised Code, and from the judgment and sentence thereupon entered in the trial court, Vorsteg has perfected an appeal to this court.

Prior to the trial, the defendant filed a motion to suppress evidence, but after a hearing, the motion was overruled. The order overruling the motion provides the basis for the first assignment of error which has been stated by the appellant as follows:

"1. Upon the facts then before it, the court below erred, as a matter of law, in failing to sustain the applicant's motion to suppress the evidence seized as a result of an illegal inventory procedure."

In a comprehensive written decision, the Common Pleas Court discussed the facts of this particular case, and the law applicable thereto, and our examination of the record fails to disclose any basis for any departure from the findings and conclusions of the trial court. See particularly, South Dakota v. Opperman, 428 U.S. 364; State v. Robinson, 58 Ohio St.2d 478. Hence, the first assignment of error is overruled.

The second assignment of error has been set forth as follows:

"2. The trial court's findings that the appellant was in possession of the contraband found in the trunk of the vehicle pursuant to the illegal inventory procedure,

contrary to Ohio Rev. Code Section 2925.03(A)(6), is against the manifest weight of the evidence, constituting an abuse of discretion."

In support of this alleged error, the appellant argues that the State produced insufficient evidence to show actual or constructive possession of the marijuana. In other words, Vorsteg maintains that the State failed to show that he knowingly possessed a controlled substance in an amount equal to or exceeding three times the bulk amount, as required to sustain a conviction for a violation of Section 2925.03(A)(6), Revised Code.

In this regard, the evidence discloses that the defendant was observed by Officer T.G. Keast of the Ohio State Highway Patrol as he entered a Seven-Eleven Store. Keast observed that Vorsteg was intoxicated, and he noticed that the defendant had a handgun in this rear pocket. When Vorsteg left the store, he entered a 1981 Ford occupied by two other men. Keast followed the vehicle for a short distance whereupon he stopped the car. Keast thereupon recovered a gun and ammunition clip from the area of the car where the defendant was seated, and he then placed Vorsteg under arrest.

Subsequently, the officer discovered a rental agreement in the glove compartment which showed that the automobile had been leased from Eastgate Ford to Donna Vorsteg, the mother of appellant, and that other than Donna, the defendant was the only authorized driver of the vehicle. After the defendant was arrested, the car was towed to a garage in Beavercreek because it was parked on the roadway and impeding the flow of traffic on Spaulding Avenue. At the garage, the car was inventoried whereupon the police officers discovered a duffel bag with Vorsteg's name on it, and the bag

contained a large quantity of marijuana. The trunk also contained other packages of marijuana and a set of scales, and two marijuana cigarettes were discovered in an ashtray near where the defendant had been sitting in the car. In all, about 3,441 grams of marijuana were recovered from the rented automobile.

the present case, the record contains substantial evidence to prove all of the essential elements of the offense, including possession, beyond a reasonable doubt, and the opinion of a reviewing court has not force against conflicting evidence and inferences. See, 5 O. Jur. 3d 194, Section 604. The credibility of the witnesses and the weight to be given their testimony posed questions for the determination of the trial court (*State v. DeHass*, 10 Ohio St.2d 230), and this court may not interefere (*State v. Eley*, 56 Ohio St.2d 169). The second assignment of error is without merit.

In our opinion, Mr. Vorsteg had a fair trial, and neither of the alleged errors being well made, the judgment of the Common Pleas Court will be affirmed.